

United States

Circuit Court of Appeals

For the Ninth Circuit. 12

Joseph B. O'Neil, AS RECEIVER OF THE
CALIFORNIA NATIONAL BANK OF SAC-
RAMENTO,

Appellant,

vs.

FRANK P. WILSON,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the
Northern District of California,
Northern Division.

FILED

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PAUL P. BISHEN,

No. 7805

United States

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For the Ninth Circuit.

H. W. DOUGLASS, AS RECEIVER OF THE
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Appellant:

HINSDALE, OTIS & JOHNSON, Esqs.

GERALD R. JOHNSON, Esq.

1100 California State Life Bldg.,

Sacramento, Calif.

Attorneys for Appellee:

H. B. SEYMOUR, Esq.

DOWNEY, BRAND & SEYMOUR, Esqs.

Capital National Bank Bldg.,

Sacramento, Calif.

In Equity No. 1163-S

In the United States District Court for the Northern District of California, Northern Division.

H. W. DOUGLASS, AS RECEIVER OF THE CALIFORNIA NATIONAL BANK OF SACRAMENTO,

Appellant,

vs.

FRANK P. WILSON,

Appellee.

COMPLAINT.

Plaintiff complaining alleges:

I.

That at all times herein mentioned The California National Bank of Sacramento has been and now is a National Banking Association organized and existing under and by virtue of the laws of the United States and at all times herein mentioned prior to January 21st, 1933, engaged in business as a National Bank at its principal place of business in the City of Sacramento, County of Sacramento, State of California. That on said January 21st, 1933, said The California National Bank of Sacramento failed to open for business and closed its doors by resolution of its Board of Directors. That on said day The Comptroller of the Currency of the United States duly and regularly declared said corporation to be insolvent and for the purpose of winding up its affairs as provided by law, took possession of all of its assets and took charge of

all of its business and affairs, and on said January 21st, 1933, duly and regularly appointed defendant, H. W. Douglas, as Receiver of said Bank. That said defendant thereupon duly qualified as such Receiver and thereupon took charge of all of the assets, business and affairs of said Bank and at all times since said appointment and qualification said defendant has been and now is the duly appointed, qualified and acting Receiver of said Bank, and as such, and at all of said times, has been and now is in possession of all of said assets, business and affairs and engaged in the winding up and liquidation thereof. [1]*

II.

That said defendant is a citizen and resident of the County of Sacramento, State of California, and within the territorial jurisdiction of the above entitled court and *and* northern division thereof. That plaintiff is a citizen and resident of the City of New York, County of New York, State of New York.

III.

That this action is designed to establish priority in right to assets of said The California National Bank of Sacramento, in the hands of defendant, as such Receiver aforesaid, and as such is an action involved in the winding up of the affairs of said Bank, original jurisdiction to hear and determine which is vested by statute in District Courts of the United States.

*Page numbering appearing at the foot of page of original certified Transcript of Record.

IV.

That at all times herein mentioned California Trust and Savings Bank has been and now is a corporation organized and existing under and by virtue of the laws of the State of California, and at all times herein mentioned prior to January 21st, 1933, engaged in the business of banking at its principal place of business in the City of Sacramento, County of Sacramento, State of California. That on said January 21st, 1933, and contemporaneously with the closing of said The California National Bank of Sacramento, said California Trust and Savings Bank suspended operations by reason of its insolvency. That continuously for many years prior and up to the date of said simultaneous suspension aforesaid, each of said institutions were conducted and operated in and occupied the same banking premises [2] in the City of Sacramento, State of California. That at all of said times all of the subscribed and issued capital stock of California Trust and Savings Bank was owned and held by The California National Bank of Sacramento in trust for the stockholders of said National Bank. That at all of said times the respective Boards of Directors of each institution were composed of the same individuals. That at all of said times the executive and administrative officers of each institution were the same individuals. That at all of said times A. B. Carter was the duly appointed, qualified and acting Vice-President and Cashier of California Trust and Savings Bank and

lifewise at all of said times was the duly appointed, qualified and acting Cashier of The California National Bank of Sacramento. That at all of said times Henry M. Weston was a duly appointed, qualified and acting Vice-President of each institution.

V.

That continuously since October 15th, 1932, plaintiff has been and now is the owner of all that certain real property situated in the City of Sacramento, County of Sacramento, State of California, more particularly described as follows:

The East $\frac{1}{4}$ of Lot 3, and the West $\frac{1}{4}$ of Lot 4 of the Block bounded by K and L and 7th and 8th Streets, of said City of Sacramento, according to the official map or plan thereof.

VI.

That plaintiff's immediate predecessor in interest in the ownership of said property was Mary Bovie Wilson, formerly known as Mary Bovie. That the said Mary Bovie Wilson is the wife of plaintiff. That on the 8th day of August, 1928, the said Mary Bovie Wilson borrowed of and from California Trust [3] and Savings Bank the sum of One Hundred Twenty Thousand Dollars (\$120,000.00) and as evidence thereof and on said date made, executed and delivered to said California Trust and Savings Bank her promissory note in the principal amount of One Hundred Twenty Thousand Dollars (\$120,000.00) and for

the purpose of securing the payment of same made, executed and delivered to A. B. Carter and H. M. Weston, as trustees of said California Trust and Savings Bank, a deed of trust upon the real property above described, which deed of trust was duly acknowledged and thereafter recorded in the office of the County Recorder of said Sacramento County in Book 199 of Official Records, at page 226. That on October 15, 1932, the balance remaining due on account of the principal of said promissory note aforesaid, was the sum of One Hundred Ten Thousand Dollars (\$110,000.00).

VII.

That immediately upon acquisition by plaintiff of the ownership of said real property, plaintiff together with the said Mary Bovie Wilson, made, executed and entered into an agreement in writing with the said California Trust and Savings Bank whereunder and whereby said California Trust and Savings Bank agreed to renew said loan upon said property in the sum of One Hundred Twenty Thousand Dollars (\$120,000.00) (an advance of Ten Thousand Dollars (\$10,000.00)) for an additional period of five years beyond its then due date providing, among other things, plaintiff would forthwith expend the sum of between Forty Thousand Dollars (\$40,000.00) and Fifty Thousand Dollars (\$50,000.00) in making improvements upon said property and providing further that plaintiff would forthwith deposit with said California Trust and Savings Bank the sum of at least Thirty five Thou-

sand Dollars (\$35,000.00) as a fund out of which the cost, in part, of said improvements would be defrayed and as a guarantee of such payment.

VIII.

That pursuant to said agreement and in conformity [4] therewith plaintiff forthwith commenced the construction of the requisite improvements upon said property and under date of October 21st, 1932, transmitted to said California Trust and Savings Bank by letter from New York City, his check in the sum of Thirty Five Thousand Dollars (\$35,000.00) for deposit in said California Trust and Savings Bank, all as provided by said agreement, said letter of enclosure containing and stating with respect to said deposit the following:

“I enclose herewith my check for \$35,000. which is to be collected and deposited with you and used in the payment of improvements made upon the property 722-24 K Street as work done under the terms of the contracts is certified to you by John Leete, the supervising architect.

“This deposit is made with you for this specific use and for no other purpose.”

IX.

That upon receipt of said check, California Trust and Savings Bank stated and declared that inasmuch as said Bank did not afford checking facilities for its depositors, it would cause said deposit to be made in the name of plaintiff in The Cali-

for California National Bank of Sacramento under the terms and conditions stated in plaintiff's letter of October 21st, 1932, aforesaid. That thereupon said California Trust and Savings Bank caused to be deposited in The California National Bank of Sacramento in plaintiff's name the proceeds of said check amounting to the sum of Thirty Five Thousand Dollars (\$35,000.00) and said deposit was duly and regularly accepted by said The California National Bank of Sacramento under and pursuant to the terms of plaintiff's letter of October 21st, 1932, said deposit being [5] opened under the name and designation "Frank P. Wilson, Special Account, 50 Broadway, New York City, New York". That the assets of said The California National Bank of Sacramento were thereby augmented and increased in the amount of said proceeds, to wit, in the sum of Thirty Five Thousand Dollars (\$35,000.00).

X.

That all negotiations with plaintiff and the said Mary Bovie Wilson with respect to said agreement and deposit aforesaid were conducted on behalf of each of said Banks by the officials and each of them above named, to wit, A. B. Carter and Henry M. Weston, and at the time of the making of said deposit of Thirty Five Thousand Dollars (\$35,000.00) in plaintiff's name in said The California National Bank of Sacramento, said officials and each of them were fully cognizant of the terms and conditions under which said sum was trans-

mitted by plaintiff for deposit and said officers and each of them, on behalf of said The California National Bank of Sacramento, duly and regularly accepted said deposit in accordance with said terms.

XI.

That on the date of suspension of said The California National Bank of Sacramento, there remained unexpended in said account, a balance of Thirteen Thousand Four Hundred Twenty Nine and 60/100ths Dollars (\$13,429.60). That at said time, the improvements on said real property, agreed to be constructed by plaintiff as aforesaid, were then in course of construction, and said deposit was being employed by plaintiff, pursuant to the terms of said agreement, in payment and discharge of the costs thereof. That since the suspension of said Banks on said date, the construction of the improvements so agreed to be constructed on said real property has been completed, all in accordance with [6] said agreement, and plaintiff has laid out and expended since said date and in order to effect said completion a sum greatly in excess of the amount of the balance of the deposit remaining in said The California National Bank of Sacramento on the date of its suspension.

XII.

That at all times since the date of the augmenting of the assets of said The California National

Bank of Sacramento by the amount of said deposit aforesaid and up to and including the date of said suspension, to wit, January 21st, 1933, there was on hand in cash in said bank an amount in excess of the balance due from time to time on account of plaintiff's deposit, including the amount due thereon on said date of closing, namely, Thirteen Thousand Four Hundred Twenty Nine and 60/100ths Dollars (\$13,429.60), and an amount in excess of the balance due, during said period, on all deposits of a similar character.

XIII.

That following defendant's appointment as Receiver aforesaid and within the time and in the manner provided by statute in such case made and provided, plaintiff duly and regularly presented to and filed with defendant as such Receiver, his verified claim in writing whereunder and whereby, plaintiff claimed said sum of Thirteen Thousand Four Hundred Twenty Nine and 60/100ths Dollars (\$13,429.60) as a preferred claim and entitled to priority in payment as herein set forth, which claim set forth and contained the terms and conditions under which said deposit was made, all as averred herein. That thereafter and on July 22nd, 1933, said claim was rejected by The Comptroller of the Currency of the United States and by defendant as such Receiver aforesaid with [7] notification to plaintiff that the same would be allowed as a general claim only.

XIV.

That plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays the judgment and decree of this Court as follows:

1. That an accounting be had of the assets, business and affairs of said The California National Bank of Sacramento, and that defendant be required to so account, to the extent of determining all facts and circumstances appropriate to a determination of the issues involved herein; that said accounting include, in addition to any and all facts and circumstances otherwise appropriate, (a) a determination of the amount of cash on hand in said Bank at all times between the date of plaintiff's deposit, to wit, October 21st, 1932, and to and including the date of the closing of said institution, to wit, January 21st, 1933, and (b) a determination of the aggregate amount of all deposits, during said period, of a character similar to plaintiff's together with the amount of all increases therein and withdrawals therefrom.

2. That an appropriate decree be made and entered herein impressing upon the assets of said Bank on date of closing and possession of which was taken by defendant, as such Receiver, a trust, preference and priority in plaintiff's favor in the sum of Thirteen Thousand Four Hundred Twenty Nine and 60/100th Dollars (\$13,429.60) and adjudging that defendant, as such receiver, holds said sum of Thirteen Thousand Four Hundred Twenty

Nine and 60/100ths Dollars (\$13,429.60) as trustee for plaintiff [8] and requiring payment of the amount of same forthwith to plaintiff.

3. In the event it is adjudicated that such trust, preference and priority in plaintiff's favor does not exist as to the whole of said amount, that such relief be nevertheless granted as to such portion thereof as to which such trust, preference and priority is decreed to exist and that such decree declaring such partial trust be entered without prejudice to plaintiff's right to a general claim against said Receivership for any balance of sum and that as to said balance it be decreed that plaintiff has a general claim therefor, payable by defendant to plaintiff as such.

4. In the event it is adjudicated that such trust, preference and priority in plaintiff's favor does not exist as to any portion of said amount, that such decree be made and entered without prejudice to plaintiff's right to a general claim against said receivership and that it be decreed that plaintiff is entitled to such general claim and that said sum is payable by defendant to plaintiff as such.

5. For such further and additional relief as to the Court may seem meet and proper.

Dated: October 6th, 1933.

H. B. SEYMOUR

DOWNEY, BRAND & SEYMOUR,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct 6 1933. [9]

[Title of Court and Cause.]

ANSWER.

Answering the complaint herein, defendant alleges:

A.

That the complaint herein does not state facts sufficient to entitle plaintiff to the relief sought or to any relief and does not state facts sufficient to constitute a valid cause of action in equity—in this that it appears from the allegations of the complaint that the deposit mentioned therein was not impressed with a trust or that said deposit was other than an ordinary deposit made in the ordinary course of business obtaining in the ordinary business of banks and created only the relation of debtor and creditor, and said complaint states no facts sufficient to entitle plaintiff to a preference over other depositors and creditors of said The California National Bank of Sacramento; and by reason of the foregoing deficiencies plaintiff ought not to be allowed to maintain this suit and said suit should be dismissed with costs to defendant.

B.

And not waiving the foregoing objection but at all times insisting thereon, defendant for a Second Answer to the complaint admits, denies and alleges, as follows, that is to say,

I.

Defendant admits all the allegations contained in Paragraph I of the complaint.

II.

Defendant admits all the allegations contained in Paragraph II of the complaint.

III.

Defendant admits all the allegations contained in Paragraph III of the complaint. [10]

IV.

Referring to the allegations contained in Paragraph IV of the complaint: defendant alleges that he is without knowledge as to whether or not the board of directors of the California Trust and Savings Bank and of The California National Bank of Sacramento were at any time composed of the same individuals; and is without knowledge as to whether or not the executive or administrative *offices* of the said institution were at any time the same individuals; and is without knowledge as to whether or not A. B. Carter or H. M. Weston was at any time a Vice President or Cashier of the California Trust and Savings Bank; and is without knowledge whether or not at all of said times all of the subscribed and issued capital stock of California Trust and Savings Bank was owned and held by The California National Bank of Sacramento in trust for the stockholders of said national bank; and

Defendant admits all the remaining allegations of said Paragraph IV.

V.

Defendant alleges that he is without knowledge as to any of the matters, things or allegations contained in Paragraph V of the complaint.

VI.

Defendant alleges that he is without knowledge as to any of the matters, things or allegations contained in Paragraph VI of the complaint.

VII.

Defendant alleges that he is without knowledge as to any of the matters, things or allegations as contained in Paragraph VII, of the complaint.

VIII.

Defendant alleges that he is without knowledge as to any of the matters, things or allegations as contained in Paragraph VIII of the complaint.

[11]

IX.

Referring to the allegations contained in Paragraph IX of the complaint defendant denies that the deposit of Thirty-five Thousand (\$35,000.00) Dollars mentioned in said paragraph was made, or caused to be made by California Trust and Savings Bank, and denies that said deposit was accepted by said The California National Bank of Sacramento under or pursuant to the terms of any letter and denies that it was accepted under or in pursuance of any agreement, arrangement or understanding whatsoever save and except the usual and customary

agreement obtaining in cases of ordinary deposits in banks—and in that regard plaintiff alleges that said deposit of Thirty-five Thousand (\$35,000.00) Dollars was none other than an ordinary deposit in bank and created only the relation of debtor and creditor between said bank and plaintiff; and defendant denies that the assets of said bank were augmented or increased in any amount by said deposit.

Defendant admits the remaining allegations of said Paragraph IX of the complaint.

X.

Defendant alleges that he is without knowledge as to any of the matters, things, or allegations contained in Paragraph X of the complaint.

XI.

Referring to the allegations contained in Paragraph XI of the complaint, defendant admits that on the date of the suspension of said The California National Bank of Sacramento there remained unexpended in the account of plaintiff the sum of Thirteen Thousand Four Hundred Twenty-nine and 60/100ths (\$13,429.60) Dollars; and defendant alleges that he is without knowledge as to any other matters, things or allegations contained in said Paragraph XI of the complaint. [12]

XII.

Referring to the allegations contained in Paragraph XII of the complaint; defendant admits that

at all times since the making of said deposit and up to and including January 21, 1933 (date of suspension of said bank) there was on hand in said bank an amount in excess of the balance due from defendant on account of plaintiff's deposit, including the balance due thereon at said date of closing, namely, Thirteen Thousand Four Hundred Twenty-nine and 60/100th (\$13,429.60) Dollars; but defendant denies that there was at any time on hand in cash any amount in excess of the balance due, during said period or at any other time, on all deposits of similar character to that of the deposit to the credit of plaintiff as aforesaid.

XIII.

Defendant admits the allegations contained in Paragraph XIII of the complaint, except that defendant denies that said deposit was made or accepted on any of the terms set forth in said claim.

C.

And for a Third Answer to said complaint, defendant alleges:

That on, to-wit, October 27, 1932, one S. S. Ruttenberg was the agent of plaintiff, and on said date he deposited with and in said The California National Bank of Sacramento the personal check of plaintiff drawn on Manufacturers Trust Company, New York for Thirty-five Thousand (\$35,000.00) Dollars, and directed that same be placed to the credit of "Frank P. Wilson, Special Account, #50 Broadway, New York, N. Y." [13]

That said check was received by said bank and credited on the books of said bank as so directed as aforesaid, and said direction was the only direction given to, and the only understanding, agreement or terms on which said deposit was delivered to or accepted by said The California National Bank of Sacramento; and said deposit is the only deposit at any time made for or by plaintiff. Said deposit was made in the ordinary course of the banking business, and was at all times subject to be drawn out on checks signed by plaintiff, for which purpose plaintiff, in accordance with the customary requirements of banks, furnished his signature card as Frank P. Wilson, attaching thereto his address as being 50 Broadway, New York City, N. Y.:

That at divers and sundry times since the making of said deposit various sums were drawn out of same by or for plaintiff, on checks signed "Frank P. Wilson" and no sums were drawn therefrom save and except by checks signed by said Frank P. Wilson.

That said deposit was not impressed with a trust and was none other than an ordinary deposit creating the relation of debtor and creditor; and that The California National Bank of Sacramento had no notice or knowledge of any facts or circumstances showing or tending to show that said deposit was other than an ordinary deposit subject to check and creating only the relation of debtor and cred-

itor usually obtaining between a bank and its ordinary and general depositors.

Wherefore having fully answered, defendant prays to be hence dismissed with his reasonable costs and disbursements.

HINSDALE, OTIS & JOHNSON,
Sacramento, California
Attorneys for Defendant.

[Endorsed]: Filed Nov 15 1933. [14]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Tuesday, the 13th day of March, in the year of our Lord one thousand nine hundred and 34.

PRESENT: The Honorable A. F. ST. SURE,
District Judge.

No. 1163-S

FRANK P. WILSON,

vs.

H. W. DOUGLASS, as Receiver of the California
National Bank of Sacramento.

This cause came on this day for trial. H. B. Seymour, Esq., appearing as attorney for plaintiff and Gerald R. Johnson and R. W. Jennings, Esqrs., appearing as attorneys for the defendant. Mr. Seymour made a statement to the Court on behalf of the plaintiff. Henry Weston and Stanford S. Ruttenberg were sworn and testified on behalf of

plaintiff. Plaintiff introduced in evidence and filed plaintiff's exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8 and 9, and the plaintiff rested. Mr. Johnson made a motion for non-suit on behalf of the defendant, which said motion was ordered denied. Henry M. Weston was recalled and Darwin A. Sherwin were sworn and testified on behalf of the defendant. Defendant introduced in evidence and filed defendant's exhibits marked A, B, c and D. Ordered that the further trial hereof be continued to March 14, 1934 at 10 o'clock A. M. [15]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Wednesday, the 14th day of March, in the year of our Lord one thousand nine hundred and 34.

PRESENT: The Honorable A. F. ST. SURE,
District Judge.

[Title of Cause.]

The parties hereto being present as heretofore, the trial hereof was resumed. Henry M. Weston and Darwin A. Sherwin were re-called and Wilbur D. Polk and J. E. Dyer were each sworn and testified on behalf of the defendant. Stanford S. Ruttenburg was re-called by defendant for further cross-examination and further testified on behalf of plaintiff. Plaintiff introduced in evidence and filed plaintiff's exhibits Nos. 10 and 11. After hearing the attorneys, it is ordered that this cause

be submitted upon briefs to be filed in 15, 10 and 10 days from and after the filing of certain depositions to be taken on behalf of the respective parties.

[16]

[Title of Court and Cause.]

MOTION OF DEFENDANT FOR FINDINGS
AND JUDGMENT.

Comes now defendant, at the close of the evidence herein, and moves the court to find from the evidence:

I.

That the deposit of funds mentioned in paragraph IX of the complaint herein and which is in controversy in this suit was made by plaintiff, Frank P. Wilson (by his agent S. F. Ruttenberg) and said deposit was not made by said plaintiff, and was not accepted by The California National Bank of Sacramento, under or in pursuance of any of the terms of any letter; and was not made or accepted on any terms or conditions save and except on the terms and conditions of an ordinary and general deposit in a commercial bank.

II.

That there never was any agreement or understanding between plaintiff and The California National Bank of Sacramento that the deposit of funds referred to in the complaint and involved in this cause, was to be held or kept separate from the general funds of said Bank.

III.

That at the time of the suspension of The California National Bank of Sacramento the funds comprising the deposit involved in this suit had, with the knowledge and consent of the depositor (viz, the complainant), been mingled with, and had become a part of, the general assets of said bank and subject [17] to the check of said depositor as in the case of ordinary deposits in commercial banks.

And to hold that on the whole case the law and the facts are with defendant and plaintiff is not entitled to the relief sought or to any relief, and the Bill of Complaint should be dismissed with costs.

Dated: April 16, 1934.

HINSDALE, OTIS & JOHNSON
Attorneys for Defendant.

Copy received this 16th day of April, 1934.

DOWNEY, BRAND & SEYMOUR
Attorneys for Plaintiff.

[Endorsed]: Filed Apr 16, 1934. [18]

[Title of Court and Cause.]

ORDER.

After full consideration, it is

ORDERED that a decree be entered herein in favor of plaintiff as prayed for in his bill of com-

plaint, particularly in accordance with paragraph two of the prayer, together with interest and costs.

Findings of fact and conclusions of law to be prepared in accordance with Rule No. 42 of this court.

Dated: November 16, 1934.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Nov 16 1934. [19]

[Title of Court and Cause.]

REQUEST OF DEFENDANT FOR FINDINGS
OF FACT AND CONCLUSIONS OF LAW

Above named defendant requests the Court to make Findings and Conclusion as follows, viz:

I.

That the deposit of funds mentioned in paragraph IX of the complaint herein and which is in controversy in this suit was made by plaintiff, Frank P. Wilson (by his agent S. S. Ruttenberg) with The California National Bank of Sacramento and said deposit was not made by said plaintiff, and was not accepted by The California National Bank of Sacramento, under or in pursuance of any of the terms of any letter; and was not made or accepted on any terms or conditions save and except on the terms and conditions of an ordinary and general deposit in a commercial bank.

II.

That there never was any agreement or understanding between plaintiff and The California National Bank of Sacramento that the deposit of funds referred to in the complaint and involved in this cause, was to be held or kept separate from the general funds of said bank or was not to be used by said bank in the general and usual conduct of its business as a commercial bank.

III.

That at the time of the suspension of The California National Bank of Sacramento the funds comprising the deposit involved in this suit had, with the knowledge and consent of the depositor (viz, the complainant), been mingled with, and had [20] become a part of, the general assets of said bank and subject to the check of said depositor as in the case of ordinary deposits in commercial banks.

IV.

That the said The California National Bank of Sacramento was a national bank and the California Trust and Savings Bank was a state bank and said two banks were entirely separate and distinct corporate entities, and as to the deposit in question in this suit said banks had no privity of contract or of interest with each other.

V.

That said The California National Bank of Sacramento had no notice or knowledge of any agree-

ment or understanding between plaintiff and the said California Trust and Savings Bank that the deposit involved in this suit was a special deposit or was impressed with any trust whatsoever.

And to hold that on the whole case the law and the facts are with defendant and plaintiff is not entitled to the relief sought or to any relief, and the Bill of Complaint should be dismissed with costs.

Dated: November 22, 1934.

HINSDALE, OTIS & JOHNSON
Attorneys for Defendant.

Copy received and service accepted this 22nd day of November, 1934.

DOWNEY, BRAND & SEYMOUR
Attorneys for Plaintiff.

[Endorsed]: Filed Nov 22 1934. [21]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled cause came on regularly for trial on March 13, 1934, before the Court sitting without a jury, H. B. Seymour, Esq., and Messrs. Downey, Brand & Seymour appearing on behalf of plaintiff, and defendant appearing with and by his counsel Gerald R. Johnson, and evidence both oral and documentary having been introduced and the case argued by respective counsel and the cause

submitted to the Court for decision, the Court now makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

I.

That on January 21, 1933, and for many years prior thereto The California National Bank of Sacramento was and had been a National Banking Association engaged in the banking business in the City of Sacramento, State of California. That on said date it suspended business by reason of insolvency and defendant, H. W. Douglass, took possession of all of its assets and took charge of all of its business and affairs as Receiver of said Bank, duly appointed as such by The Comptroller of the Currency of the United States, and ever since said time the said H. W. Douglass has been and now is in possession of all of said assets, business and affairs and engaged, as such Receiver, in the winding up and liquidation thereof. [22]

II.

That plaintiff is a citizen and resident of the City of New York, County of New York, State of New York; that defendant is a citizen and resident of the County of Sacramento, State of California, and within the territorial jurisdiction of the Court and the Northern Division thereof. That this action is designed to establish priority in right to assets of said The California National Bank of Sacramento in the hands of defendant as such Receiver

and as such is an action involved in the winding up of the affairs of said Bank, original jurisdiction to hear and determine which is vested by statute in District Courts of the United States.

III.

That on January 21, 1933, and for many years prior thereto, California Trust and Savings Bank was and had been a banking corporation organized and existing under and by virtue of the laws of the State of California and engaged in the banking business in the City of Sacramento. That on said date and contemporaneously with the closing of said The California National Bank of Sacramento, said California Trust and Savings Bank likewise suspended operations by reason of its insolvency. That continuously for many years prior and up to the date of said simultaneous suspension aforesaid, each of said institutions were conducted and operated in and occupied the same banking premises in the City of Sacramento, State of California. That at all of said times all of the subscribed and issued capital stock of California Trust and Savings Bank was held in trust for the stockholders of said National Bank. That at all of said times the respective Boards of Directors of each institution were composed of the same individuals. That at all of said times the [23] executive and administrative officers of each institution were the same individuals. That at all of said times A. B. Carter was the duly appointed, qualified and acting Vice-President and Cashier of California Trust and

Savings Bank and likewise at all of said times was the duly appointed, qualified and acting Cashier of The California National Bank of Sacramento. That at all of said times Henry M. Weston was a duly appointed, qualified and acting Vice-President of each institution.

IV.

That continuously since October 15, 1932, plaintiff has been and now is the owner of all that certain real property situated in the City of Sacramento, County of Sacramento, State of California, more particularly described as follows:

The East $\frac{1}{4}$ of Lot 3, and the West $\frac{1}{4}$ of Lot 4 of the Block bounded by K and L and 7th and 8th Streets, of said City of Sacramento, according to the official map or plan thereof.

V.

That plaintiff's immediate predecessor in interest in the ownership of said property was Mary Bovie Wilson, formerly known as Mary Bovie. That the said Mary Bovie Wilson is the wife of plaintiff. That on the 8th day of August, 1928, the said Mary Bovie Wilson borrowed of and from California Trust and Savings Bank the sum of One Hundred Twenty Thousand Dollars (\$120,000.00) and as evidence thereof and on said date made, executed and delivered to said California Trust and Savings Bank her promissory note in the principal amount of One Hundred Twenty Thousand Dollars

(\$120,000.00) and for the purpose of securing the payment of same made, executed and delivered to A. B. Carter and [24] H. M. Weston, as trustees of said California Trust and Savings Bank, a deed of trust upon the real property above described, which deed of trust was duly acknowledged and thereafter recorded in the office of the County Recorder of said Sacramento County in Book 199 of Official Records, at page 226. That on October 15, 1932, the balance remaining due on account of the principal of said promissory note aforesaid, was the sum of One Hundred Ten Thousand Dollars (\$110,000.00).

VI.

That immediately upon acquisition by plaintiff of the ownership of said real property, plaintiff, together with the said Mary Bovie Wilson, made, executed and entered into an agreement in writing with the said California Trust and Savings Bank whereunder and whereby said California Trust and Savings Bank agreed to renew said loan upon said property in the sum of One Hundred Twenty Thousand Dollars (\$120,000.00) (an advance of Ten Thousand Dollars (\$10,000.00)) for an additional period of five (5) years beyond its then due date providing, among other things, plaintiff would forthwith expend the sum of between Forty Thousand Dollars (\$40,000.00) and Fifty Thousand Dollars (\$50,000.00) in making improvements upon said property and providing further that plaintiff would forthwith deposit with said California Trust

and Savings Bank the sum of at least Thirty-five Thousand Dollars (\$35,000.00) as security in favor of said Bank and as a guarantee that said improvements would be constructed as promised.

VII.

That pursuant to said agreement and in conformity therewith, plaintiff forthwith commenced the construction of the requisite improvements upon said property. That on October 21, 1932, and for the purpose of providing said security aforesaid, and as [25] a guarantee that said improvements would be constructed as promised, plaintiff transmitted to said California Trust and Savings Bank the sum of Thirty-five Thousand Dollars (\$35,000.00) which amount was received and accepted by said bank upon the understanding, and said bank thereupon agreed with plaintiff, that said amount was remitted by plaintiff as security only; that said remittance was not to be employed by said bank for its own purposes; and that the only and specific use to be made of said amount, and to the exclusion of all other uses, was the fulfillment of said guarantee by the application of said fund to the cost of said improvements, and not otherwise.

VIII.

That immediately upon receipt of said sum of Thirty-five Thousand Dollars (\$35,000.00) and by mutual agreement between plaintiff, California Trust and Savings Bank and The California National Bank of Sacramento, said fund was act-

ually deposited in plaintiff's name with The California National Bank of Sacramento and that at all times The California National Bank of Sacramento was fully cognizant of all of the terms, agreements, conditions, covenants and agreements of the parties in respect to said fund and its purpose and of all limitations in respect to its use and accepted said deposit upon said terms and each and all of them, and promised and agreed with plaintiff that said amount was transmitted by plaintiff and was received and accepted by said The California National Bank of Sacramento for the purpose of security only; that said fund was not to be employed by said The California National Bank of Sacramento for its own purposes; and that the only and specific use to be made of said fund, and to the exclusion of all other uses, was the fulfillment of said guarantee by the application of said fund to the cost of said [26] improvements and not otherwise. That by said agreement the parties intended to and did make and constitute The California National Bank of Sacramento trustee of said fund and a trust in the amount of said deposit was created by the parties by the terms and provisions of said understanding, and under said trust the use of said fund was restricted to the specific uses stated herein.

IX.

That the assets of said The California National Bank and the assets of said Bank coming into the hands of defendant as Receiver of said Bank, were

augmented and increased by the amount of said deposit, to-wit, by the sum of Thirty-five Thousand Dollars (\$35,000.00).

X.

That on the date of the suspension of The California National Bank of Sacramento, to-wit, on January 21, 1933, the sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars (\$13,429.60) remained unexpended in said fund and that all amounts expended from said fund prior to such suspension were employed in accordance with the terms of said agreement of guarantee, to-wit, said funds were applied on account of the cost of said improvements. That on the date of said suspension said improvements were in course of construction and that since said time plaintiff has completed said improvements, all in accordance with his agreement, and plaintiff has laid out and expended since said date and in order to effect said completion, a sum greatly in excess of the amount of the balance of said fund remaining in said The California National Bank of Sacramento on the date of its suspension. That plaintiff has in all respects otherwise duly performed all obligations of every kind and character on his part to be observed, kept and performed in favor of said Californis Trust and Savings Bank and The California National Bank of [27] Sacramento and defendant, H. W. Douglass, as such Receiver.

XI.

That at all times since the date of the augment-

ing of the assets of said The California National Bank of Sacramento by the amount of said deposit aforesaid and up to and including the date of said suspension, to-wit, January 21, 1933, there was on hand in said bank an amount in excess of the unexpended balance from time to time of said deposit of Thirty-five Thousand Dollars (\$35,000.00), including the unexpended balance thereof, on said date of closing, namely, Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars (\$13,429.60) and that at all of said times there was in addition thereto an amount on hand in cash in excess of the balance due during said period on all deposits in said bank of a similar character. That included in the assets which came into defendant's hands, as such Receiver, was said sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars (\$13,429.60) and said assets so coming into said defendant's hands were received by him subject to a trust therein in plaintiff's favor for the full unexpended balance of said sum of Thirty-five Thousand Dollars (\$35,000.00), to-wit, Thirteen Thousand, four hundred Twenty-nine and 60/100ths Dollars (\$13,429.60) and said sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars (\$13,429.60) has in all respects been traced into the hands of defendant as such Receiver.

XII.

That following defendant's appointment as Receiver aforesaid and within the time and in the

manner provided by statute in such case made and provided, plaintiff duly and regularly presented to and filed with defendant as such Receiver, his [28] verified claim in writing whereunder and whereby plaintiff claimed said sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths (\$13,429.60) as a preferred claim and entitled to priority in payment, which claim set forth and contained the terms and conditions under which said deposit was made, all as found herein. That thereafter and on July 22, 1933, said claim was rejected by The Comptroller of the Currency of the United States and by defendant as such Receiver aforesaid, with notification to plaintiff that the same would be allowed as a general claim only.

XIII.

That plaintiff has no plain, speedy or adequate remedy at law.

XIV.

That all of the allegations of plaintiff's complaint in this action, in respect to which no specific finding is made in the foregoing, are and each of them is true. That all of the allegations of defendant's answer inconsistent with or contrary to these findings are and each of them is untrue.

CONCLUSIONS OF LAW.

As conclusions of law, from the foregoing findings of fact the Court finds:

1. That The California National Bank of Sac-

ramento received said sum of Thirty-five Thousand Dollars (\$35,000.00) in trust and not otherwise and said Bank was not authorized to use said amount or any part thereof for its own purposes; that the assets of said Bank were augmented in the sum of Thirty-five Thousand Dollars (\$35,000.00) by reason of said deposit and the unexpended balance thereof, to-wit, Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars (\$13,429.60), has been [29] followed and traced into defendant's hands as Receiver, and the assets of said bank which came into defendant's hands as such Receiver were received by him subject to said trust in plaintiff's favor in the amount of said unexpended balance, to-wit, Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars (\$13,429.60).

2. That plaintiff is entitled to a decree impressing a trust, preference and priority in plaintiff's favor in the sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars (\$13,429.60) upon the assets of said Bank in defendant's hands, as Receiver, and adjudging that defendant holds the sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars (\$13,429.60) as trustee for plaintiff and that plaintiff is entitled to payment of said sum forthwith and accordingly that plaintiff have judgment against defendant in the sum of Thirteen Thousand, Four Hundred Twenty-nine and 60.100ths Dollars (\$13,429.60) in

lawful money of the United States, together with his costs of suit.

That a decree be entered accordingly.

Dated: December 10, 1934.

A. F. ST. SURE

Judge.

[Endorsed]: Filed Dec 10 1934. [30]

In the District Court of the United States, in and for the Northern District of California, Northern Division.

In Equity No. 1163-S

FRANK P. WILSON,

Plaintiff,

vs.

H. W. DOUGLASS, as Receiver of THE CALIFORNIA NATIONAL BANK OF SACRAMENTO,

Defendant.

DECREE.

The above entitled cause came on regularly for trial, and proofs of the respective parties having been presented and the cause having been argued and submitted and duly considered, and Findings of Fact and Conclusions of Law having been duly made and entered herein,

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

(1) That there be and is hereby impressed in plaintiff's favor upon the assets of The California National Bank of Sacramento, a corporation, coming into the hands of defendant H. W. Douglass as Receiver of said Bank, a trust, preference and priority in the sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars (\$13,429.60).

(a) That defendant holds the sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars (\$13,429.60) as trustee for plaintiff and that plaintiff is entitled to the payment of said sum forthwith.

(3) That plaintiff do have and recover from defendant, as Receiver of said The California National Bank of Sacramento, a corporation, the sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars (\$13,429.60), together with his costs of court herein taxed in the sum of \$59.47.

Dated: Dec. 10, 1934.

A. F. ST. SURE

Judge

[Endorsed]: Filed and entered Dec. 10, 1934.

[31]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE

BE IT REMEMBERED that the above entitled

cause came on to be tried on the 13th day of March, 1934, before Hon. A. F. St. Sure, one of the Judges of the above entitled court. Plaintiff was represented by his attorneys, Messrs. Downey, Brand and Seymour, and by H. B. Seymour, Esq., and defendant by his attorneys, Messrs. Hinsdale, Otis and Johnson, and Gerald R. Johnson, Esq. The issue to be tried was whether or not plaintiff was entitled to have it adjudged that his claim for the balance of a deposit made by him in The California National Bank of Sacramento was entitled to payment in full at the hands of defendant (receiver of said bank), in priority over the claims of general creditors of said bank. The evidence introduced at the trial was as follows, to-wit:

PLAINTIFF'S CASE

H. M. WESTON,

called by Plaintiff, testified as follows:

My name is Henry M. Weston, I was formerly connected with the California Trust and Savings Bank and The California National Bank of Sacramento, in the capacity of Vice President of both institutions; and at present I am assisting in the liquidation of the California Trust and Savings Bank. The administrative and executive officers and directors of both institutions were the same; the California Trust and Savings Bank and The California National Bank of Sacramento occupied

(Testimony of H. M. Weston.)

the same banking premises—they were located in this city at 7th and J Streets.

The stock of the California Trust and Savings Bank was held in trust for the stockholders of The California National Bank of Sacramento.

What I have said relates to the makeup of the banks and was true in October, 1932, and at the time when the said banks closed, towit, on January 21, 1933. Witness identifies [32] and authenticates letter of date November 17, 1932, from Mary Wilson to California Trust and Savings Bank. Letter marked for identification, Plaintiff's Exhibit No. 1.

SANDFORD S. RUTTENBERG,
called by Plaintiff, testified as follows:

I reside at Madison, Wisconsin; am a real estate broker and builder; I know Frank Wilson, plaintiff in this case, also his wife, Mary Wilson. I was employed by Mr. Wilson and Mrs. Wilson to come out to Sacramento, California, and interview the California Trust and Savings Bank regarding an extension and renewal of a mortgage; the California Trust and Savings Bank were holders of a mortgage in the amount of \$110,000.00 on Mrs. Wilson's Sacramento property, and it was just about due and payment had been demanded. I arrived in Sacramento in the early part of October, 1932. Prior to the time I arrived in Sacramento I had conducted negotiations in Wilson's behalf

(Testimony of Sandford S. Ruttenberg.)

relative to an extension of this obligation but with no success. At that time a lease had been negotiated with respect to the Wilson property in Sacramento—a lease with W. T. Grant Company of Massachusetts, the company which is now occupying the premises—the property is 722-24 K Street.

When I arrived at Sacramento I called at the bank upon Mr. Weston, with whom I had negotiated by letter and by telegram, and I explained that I decided to come to California to see if we could not reach some agreement as to a renewal of that mortgage, and I then explained to Mr. Weston that I had negotiated a 30-year lease with the W. T. Grant Company of Massachusetts, a very substantial company, and that if the bank would consent to a renewal of the mortgage for five years and lend an additional \$10,000.00, Mr. Wilson was agreeable to erecting a new building on the site and that he would be glad to assign the lease [33] to the bank as further security for the loan. Mr. Weston informed me that he would be glad to present the matter to the Executive Committee, or, rather, to the Financial Committee and give me a decision.

The next morning I went with several members of that committee, along with Mr. Weston, and we came to a tentative agreement as to what the bank would do. Mr. Weston then drafted and handed me a letter setting out what that agreement was.

(Testimony of Sandford S. Ruttenberg.)

PLAINTIFF'S EXHIBIT NO. 2 is the letter referred to and reads as follows:

“CALIFORNIA TRUST AND SAVINGS
BANK

Head Office 7th and J Streets

Commercial—Savings—Trust

Capital Stock Owned by the Stockholders
of The California National Bank of Sacra-
mento

Sacramento, California

October 18, 1932

Branches

Arbuckle Branch

Arbuckle, California

Ione Branch

Ione, California

Loomis Branch

Loomis, California

North Sacramento Branch

North Sacramento

Mrs. Mary Wilson

c/o Frank P. Wilson

50 Broadway

New York, N. Y.

Dear Mrs. Wilson:

This is to advise you that we have this date arrived at an agreement with your representative, Mr. Rutenberg, to the effect that we will renew your present loan of \$110,000.00, secured by certain property in this city, for the sum of

(Testimony of Sandford S. Ruttenberg.)

\$120,000.00, with interest at 6% per annum, payable monthly for a period of five years, with the understanding that improvements costing between \$40,000.00 and \$50,000.00 are to be made on said property between now and January 15, 1933, and that the premises securing the loan are to be leased to the W. T. Grant Co. for a period of thirty years for a rental of \$18,000.00 per year, made payable in installments of \$1500.00 per month, and that said lease is to be assigned to this bank, and all payments accruing thereunder are to be made direct to this bank and disbursed as follows:—

“1. Payment of interest.

“2. Not less than the sum of \$833.33 per month to be paid on principal and the balance to be remitted to you or your order; said payments to continue for the first twelve months or until the sum of \$10,000.00 has been paid on the principal of said note. [34]

Thereafter, we are to accept said rentals, deducting therefrom monthly, the amount of accrued interest, plus a minimum of \$500.00 on the principal and accounting to you, or your order, for the balance.

“It is further understood that the sum of at least \$35,000.00, together with the increased \$10,000.00 arising from our new loan, is to be deposited in this bank for the purpose of payment of improvements to be made on the property in question.

(Testimony of Sandford S. Ruttenberg.)

“It is understood that the new loan is to be made in your name and the name of Frank P. Wilson.

“It is understood and agreed that the present loan is to be extended until the completion of the present alteration program, which will be on or about January 20th, 1933.

“It is further understood that the above agreement shall not become effective until all alterations and improvements of every kind and character whatsoever shall have been paid for. The \$10,000.00 increase in loan to be deposited in escrow with the title company after thirty-five days recorded notice of completion has expired.

“Very truly yours,

(Signed) “A. B. CARTER,
Vice President and Cashier.”

STIPULATED that by deed dated October 15, 1932, Mrs. Wilson conveyed this property to her husband, Frank P. Wilson, plaintiff herein.

And WITNESS, resuming, said:

At the time I received this letter of October 18, the improvements on the property consisted of a two story building with two stores downstairs and some offices upstairs. Before the letter of October 18th was handed to me, I had let a contract to a Los Angeles firm and had instructed them to start demolition of the improvements and demolition had started.

(Testimony of Sandford S. Ruttenberg.)

I forwarded this letter by air mail to Frank P. Wilson at New York. I received from Mr. Wilson a reply to this letter, and along with Mr. Wilson's said reply-letter was a check for \$35,000.00 PLAINTIFF'S EXHIBIT NO. 7 is a copy of the said letter from Mr. Wilson and is as follows: [35]

“FRANK P. WILSON

Attorney at Law

Specialist - Customs Practice

50 Broadway

New York

Bert Hanson
of Counsel

Telephone DIgby 4-7792
Cable Address “Franwilso”

October 21, 1932

California Trust and Savings Bank,
7th & J Streets,
Sacramento, California.

Gentlemen:

Att: Mr. A. B. Carter.

“I have your letter of the 18th instant addressed to Mrs. Mary Wilson, in my care, stating that on that day you had arrived at an agreement with Mr. Ruttenberg, representing us, to the effect that you would renew Mary Wilson's present loan of \$110,000. secured on certain property in your city for the sum of \$120,000., with interest at 6 per cent per annum payable monthly for a period of five years, with the understanding that improvements costing between \$40,000. and \$50,000. are to be made on said property between said date and January 15,

(Testimony of Sandford S. Ruttenberg.)

1933 and that the premises securing the loan are to be leased to W. T. Grant Co. for a period of thirty years, for a rental of \$18,000. per year, made payable in installments of \$1,500. per month, and that said lease is to be assigned to your bank and all payments accruing thereunder are to be made direct to your bank and disbursed as follows:

“1. Payment of interest

“2. Not less than the sum of \$833.33 per month to be paid on principal and the balance to be remitted to Mary Wilson, or her order; said payments to continue for the first twelve months or until the sum of \$10,000.00 has been paid on the principal of said note.

“That thereafter you are to accept said rentals, deducting therefrom monthly, the amount of accrued interest, plus a minimum of \$500.00 on the principal and account to Mary Wilson, or her order for the balance.

“That it is further understood that the sum of \$35,000.00 together with the increased \$10,000. arising from your new loan, is to be deposited in your bank for the purpose of payment of improvements to be made on the property in question.

“That it is further understood that the new loan is to be made in the name of Mary Wilson and the name of Frank P. Wilson.

“That it is further understood and agreed that the present loan to Mary Wilson is to be extended until the completion of the present alteration program, which will be on or about January 20, 1933.

(Testimony of Sandford S. Ruttenberg.)

“That it is further understood that the above agreement shall not become effective until all alterations and improvements of every kind and character whatsoever shall have been paid for. The \$10,000.00 increase in loan to be deposited in escrow with the title company after thirty-five days recorded notice of completion has expired.

“We do not quite understand the last sentence in the last paragraph of your letter. We do not see why the \$10,000. should be deposited with a title company. Your promise to pay the \$10,000. is satisfactory to us. Furthermore we do not see why the payment of \$10,000. toward the payment of improvements should be reserved until thirty-five days after recorded notice of completion has expired. It is satisfactory to us that this \$10,000. be the last payment upon certified completion of the improvements, but we think it should be available at that time should the same be necessary or convenient.

“The letter otherwise states an agreement which we accept and we hereby make application for the loan signed by Mary Wilson and Frank P. Wilson.

“On October 15, 1932, I purchased this property from Mary Wilson and the deed is now being recorded, Mary Wilson will, however, sign the application for the new loan and the new note and sign all other papers necessary.

“I enclose herewith my check for \$35,000. which is to be collected and deposited with you and used in the payment of improvements made upon the

(Testimony of Sandford S. Ruttenberg.)

property 722-24 K Street as work done under the terms of the contracts is certified to you by John Leete, the supervising architect.

“This deposit is made with you for this specific use and for no other purpose.

“The present deed of trust will be satisfied and discharged of record when the new deed of trust is executed and filed, upon the completion of improvements, on or about January 20, 1933.

“*Your* truly,

Frank P. Wilson.”

THE ABOVE MENTIONED CHECK was introduced, marked PLAINTIFF'S EXHIBIT NO. 4, and a copy thereof, without the endorsements, is as follows:

No. 2545

New York Oct 21 1932

MANUFACTURERS TRUST COMPANY 1-30

149 Broadway

PAY TO THE ORDER OF California Trust and
Savings Bank

\$35000xx

Thirty five thousand xx DOLLARS

FRANK P. WILSON

Special [37]

WITNESS resumes: On October 27, 1932, I went to the banking premises of the bank with the letter and the check—this was the date on which the deposit was opened. I walked up to Mr. Weston's desk and handed him the check and the letter

(Testimony of Sandford S. Ruttenberg.)

and said "Here it is". Mr. Weston said, "I see you made good" and he looked at the check and said "Pardon me for just a minute", and he walked over to Mr. Skinner on the other side of the bank. Mr. Skinner was the Vice President of both institutions, as I understood it. He spoke with Mr. Skinner for a few minutes and walked over to Mr. Carter's desk. Mr. Carter is also an officer of both institutions. There was rather a lengthy conversation there between Mr. Weston and Mr. Carter. Mr. Weston came back and said that Mr. Carter had requested that they have the bank's attorney come in and correct the ambiguities in the said letter of October 18, 1932, which Mr. Wilson had pointed out in his said letter of October twenty-first—in one paragraph of that letter it states that the \$10,000.00 shall be deposited along with the \$35,000.00 and in the very next paragraph is says that the \$10,000.00 shall go up in escrow with the title company of Sacramento. The attorney came in and he walked over to Mr. Carter's desk, again with Mr. Weston, and they had quite a conversation there. I was on the other side of the bank, of course, and I don't know what took place during that conversation, but after a bit Mr. Johnson, who was the attorney, and Mr. Weston came back to Mr. Weston's desk and they decided to withdraw the original letter and Mr. Johnson dictated another letter in its place, this letter

(Testimony of Sandford S. Ruttenberg.)

marked PLAINTIFF'S EXHIBIT NO. 3 is that letter or a copy thereof and is as follows, viz:

“CALIFORNIA TRUST AND SAVINGS BANK

Head Office 7th and J Streets

Comercial—Savings—Trust

Capital Stock Owned by the Stockholders of
The California National Bank of Sacramento

Sacramento, California [38]

Branches

Arbuckle Branch

Arbuckle, California

Ione Branch

Ione, California

Loomis Branch

Loomis, California

North Sacramento Branch

October 27, 1932

North Sacramento

Mrs. Mary Wilson

c/o Mr. Frank P. Wilson

#50 Broadway

New York City, New York

Dear Mrs. Wilson:

“After consultation with Mr. Ruttenberg, we wish to advise that our offer of October 18th, 1932 is hereby withdrawn and in place and stead thereof, the following offer is made you:

“This is to advise you that we have this date arrived at an agreement with your representative,

(Testimony of Sandford S. Ruttenberg.)

Mr. Ruttenberg, to the effect that we will renew your present loan of \$110,000.00, secured by certain property in this city, for the sum of \$120,000.00 (an advance of \$10,000.00), with interest at 6% per annum, payable monthly for a period of five years, with the understanding that improvements costing between \$40,000.00 and \$50,000.00 are to be made on said property between now and February 25th, 1933, and that the premises securing the loan are to be leased to the W. T. Grant Co. for a period of thirty years for a rental of \$18,000.00 per year, made payable in installments of \$1,500.00 per month, and that said lease is to be assigned to this Bank, and all payments accruing thereunder are to be made direct to this Bank and disbursed as follows:—

“1. Payment of interest.

“2. Not less than the sum of \$833.33 per month to be paid on principal and the balance to be remitted to you or your order; said payments to continue for the first twelve months or until the sum of \$10,000.00 has been paid on the principal of said note.

“Thereafter, we are to accept said rentals, deducting therefrom monthly, the amount of accrued interest, plus a minimum of \$500.00 on the principal and accounting to you, or your order, for the balance.

“When, as and if the proposed alterations have been fully completed and you and Frank P. Wilson

(Testimony of Sandford S. Ruttenberg.)

have executed to us, a new promissory note in the principal sum of \$120,000.00, dated February 25th, 1933, properly secured by a first Deed of Trust on the real property under discussion, said promissory note and Deed of Trust not to become effective until said Deed of Trust is shown by proper title report to be a first lien on the real property under discussion herein, excepting liens for taxes and rights of way heretofore granted [39] to Public Utility Corporations and party wall agreements.

“When we are assured by the Sacramento Abstract and Title Company that the title to said real property is as above specified, then, on or before thirty-five days after Notice of Completion filed in relation to the alterations aforesaid, we will deposit with the Sacramento Abstract and Title Company, payable to your order, the sum of \$10,000.00 agreed to be advanced as aforesaid.

“It is understood and agreed that the present loan is to be extended until the completion of the present alteration program, which will be on or about February 25th, 1933.

“You will note that the offer contained in our letter of October 18th, 1932, is identical with the offer contained herein, excepting in the manner in which it is worded. We felt there was some ambiguity in the last paragraph of page one and in the last paragraph of page two in our letter aforementioned.

“Please examine and advise us if satisfactory,

(Testimony of Sandford S. Ruttenberg.)

whereupon we will forward the necessary papers evidencing the new loan in the sum of \$120,000.00.

“Very truly yours,

(Signed) “A. B. CARTER,
Vice President and Cashier.”

WITNESS resumes: I called Mr. Weston’s attention to the fact that in this letter of theirs there was no mention made of that \$35,000.00, and he said “As long as you have the check here for \$35,000.00, I guess that covers it. You are going to deposit that check?” I said “Yes.” Both Mr. Carter and Mr. Weston saw Mr. Wilson’s letter of October 21st.

Mr. Weston said he would take me over to a certain gentleman—I cannot recall the name at this time,—and that the money should be deposited in the National bank because the Trust and Savings Bank did not have any facilities for checking accounts.

(STIPULATED that the person referred to by the witness was Mr. Sherwin, and that he was at that time an Assistant Cashier of both the California Trust and Savings Bank and of The California National Bank of Sacramento: Whereupon WITNESS continued as follows:)

I went over to Mr. Sherwin’s desk and the account was [40] opened. Mr. Weston introduced me

(Testimony of Sandford S. Ruttenberg.)

to Mr. Sherwin and said, "Mr. Ruttenberg is going to make a deposit here for Mr. Wilson of \$35,000.00 covering that loan of ours and Mr. Ruttenberg will give you the details, and you take care of him." I then told Mr. Sherwin I wanted this money in a special deposit in accordance with Mr. Wilson's instructions, and Mr. Sherwin said they had no stamp "Special Deposit" but they had a "Special Account". "Well," I said, "Just so you understand what it is for," and the account was opened.

THE BANK PASS BOOK showing an entry of \$35,000.00 marked "Special Account — Frank P. Wilson" was introduced and marked PLAINTIFF'S EXHIBIT 5 and copy is as follows:

"THE CALIFORNIA NATIONAL BANK
SACRAMENTO, CALIFORNIA
SPECIAL ACCOUNT
In Account with Frank P. Wilson
Oct 27 1932 DAS 35000—"

WITNESS, (on being asked if he could enlighten the Court as to the addition of the word "Special" following Mr. Wilson's signature on the check—Exhibit 4—which was deposited) said:

Before I went out to California, Mr. Wilson opened the account on which the said check was drawn, for the purpose of building this building—and I was to tell the California Trust and Savings Bank, that Mr. Wilson had deposited this money

(Testimony of Sandford S. Ruttenberg.)

in this bank and that they could refer to this bank if they cared to—that the money had been deposited there for that purpose; but this was not satisfactory—Mr. Weston thought the money ought to be put in their bank.

PLAINTIFF'S EXHIBIT NO. 6 was introduced—and WITNESS testified that same is a list of checks drawn by Mr. Wilson on this account taken from his check book stubs in the check book with statement of purpose of checks—said list is as follows: [41]

ITEMIZED LIST OF EXPENDITURES
FRANK P. WILSON \$35,000 ACCOUNT

1932

Nov. 23	S. S. Ruttenberg, disbursements trip to Sacramento, completing contracts, etc.	\$ 550.00
" 23	Ed. T. Ryan, 1st installment Sacramento County taxes 1932-33	1,403.60
" 23	C. W. Mier, 1st installment Sacramento City taxes 1932-33	782.07
" 23	Herbert M. Baruch Corporation, General contractor, first payment	4,500.00
Dec. 2	F. H. Reynolds & Co., surveying and foundation soundings	843.30
" 5	Herbert M. Baruch Corporation, second installment general contract	6,300.00

(Testimony of Sandford S. Ruttenberg.)

1932

Dec.	5	California Trust & Savings Bank, mortgage interest due December 11th	550.00
"	5	S. S. Ruttenberg, expenses and services trip to Sacramento, negotiating building contract, etc.	820.00
"	12	Jack W. Thomas, faithful performance bond and filing fee electrical contract	54.50
"	27	Herbert M. Baruch Corporation, filling in old cesspool	187.00

1933

Jan.	5	Carpenter & Mendenhall, ventilating contract	3,084.30
"	5	Jack W. Thomas, electrical contract	842.85
"	5	Luppen & Hawley, Inc., plumbing and heating	1,102.50
"	5	California Trust & Savings Bank, mortgage interest	550.00

TOTAL	\$21,570.12
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WITNESS testified that the checks for said amounts, respectively, bore the endorsement of the respective payee as above set out, and all of said checks were, and were stamped as having been, paid by The California National Bank of Sacramento.

WITNESS, resuming, said: I am familiar with

(Testimony of Sandford S. Ruttenberg.)

the expenditures made on this account—said list is a correct tabulation of the items of expenditure and what they were for from that account. After I left here I went to New York and Mr. Wilson called my attention to certain items that he wanted to pay and wanted to know if it was all right to check on that account. That was my understanding. I told him it was, and he showed me these checks along with various other checks that from time to time were to be made for payment on account of contracts and various subcontractors as certified by Mr. Leete, who was the superintendent [42] architect of W. T. Grant Company, in charge of construction. I did not fill out the checks myself. I paid no attention to who signed the checks or who drew them. I was only interested in the fact that the checks were pertaining to the building, etc.

Subsequent to the closing of the bank, in completing the improvements upon the property, Mr. Wilson spent a considerable amount in excess of the balance of that deposit. His total outlay for those improvements was about \$58,000.00.

THE LETTER which had been identified and authenticated by Mr. Weston and which had been marked for identification, PLAINTIFF'S EXHIBIT NO. 1, was now offered, received in evidence as Plaintiff's Exhibit No. 1, and copy is as follows:

(Testimony of Sandford S. Ruttenberg.)

“FRANK P. WILSON

Attorney at Law

Specialist - Customs Practice

50 Broadway

New York

Bert Hanson

Telephone DIgby 4-7792

of Counsel

Cable Address ““Franwilso”

November 17, 1932

California Trust and Savings Bank

Sacramento, California

Gentlemen :

“Your letter of October 27, 1932, containing an offer of extension of mortgage and increase to \$120,000. for five years is satisfactory to me. Your letter of October 27th is identical with the offer contained in your letter of October 18, 1932, except that ambiguity in the last paragraph on page one and last paragraph on page two is corrected.

“Please forward the necessary papers evidencing the new loan in the sum of \$120,000. for five years, the principal amortized not less than the sum of \$833.33 per month for the first year, and not less than \$500. per month for the balance of the period. This new promissory note will be signed by me, as well as Frank P. Wilson, the present owner of the property, and will be dated February 25, 1933.

“It is, of course, desired that the \$10,000. be

(Testimony of Sandford S. Ruttenberg.)

available to pay for alterations before the time to file liens has begun. I do not believe the building will be entirely completed more than 35 days before February 25, 1933, but if [43] such is a fact I wish the new loan to be advanced, but this is a matter which can be taken up later.

“Yours truly,

“MARY WILSON”.

CROSS EXAMINATION

What I have related here this morning was all that transpired at that meeting at the bank and was all that was said.

The last time I saw that letter of October 21 was when I was discussing the matter with Mr. Weston. I left the letter at the bank.

I opened this account in the name of Frank P. Wilson; and all the checks on said account were signed by Mr. Wilson; it was not my understanding that the bank should draw these checks but it was my understanding that the bank was to pass on the checks before they were paid.

I sent the signature card back to Mr. Wilson to be signed, and I sent the pass book along with it. I gave Mr. Sherwin the address of Mr. Wilson to which he was to forward the check book or checks.

Mr. Wilson paid taxes from these funds, and he also paid my expenses from these funds. He paid both the city taxes and county taxes from these funds. He paid my expenses of only one trip from

(Testimony of Sandford S. Ruttenberg.)

these funds, towit: the trip to start the construction of the building; the check of November 23rd was the original check he gave me when I left, and the check of December 5 covered a balance for items I tendered him a statement for after I returned to New York. [44]

Q. There was also paid interest on this account too; you know that, don't you?

A. Yes, sir, interest on this mortgage, I presume you are referring to.

Q. Yes. That is correct.

A. That is right.

Q. On the real property mortgaged.

A. That is right.

Q. Well, now, would this account work this way: Would you tell Mr. Wilson what items to pay?

A. Well, I had arranged with Mr. Leete to certify to me all amounts that were to be paid as the work progressed.

Q. How was that going to improve the bank's position if Mr. Wilson was in New York drawing on this account freely? Now was the bank going to become of knowledge that the architects had certified to the items?

A. Well, I assumed the bank would make whatever arrangements they thought necessary to protect their interests. I was not aware of how the bank was going to protect themselves; I presumed after the \$35,000.00 was in there the bank would look after their own interest. I was not concerned with that at all.

(Testimony of Sandford S. Ruttenberg.)

Q. Mr. Wilson was free to draw checks on this account?

A. My understanding was that when the checks came in the bank, before the check would be honored, it was to be understood they were to ascertain for what purpose the money was being paid. I didn't know just exactly how the bank handled their trust funds, nor did I attempt to tell them how to handle their business.

WITNESS resumes:

I took care of all details for Mr. Wilson. [45]

AT THIS POINT THE FOLLOWING STIPULATIONS WERE ENTERED INTO by the counsel for both parties, to-wit:

1. That the \$35,000. check which had been introduced in evidence was endorsed by the California Trust and Savings Bank and was deposited in the Frank P. Wilson account as aforesaid; that immediately on the deposit of said \$35,000. credit was given to Mr. Wilson in the amount thereof—that is to say, the check was not received for collection merely.

2. That the said check was endorsed by The California National Bank of Sacramento and immediately forwarded to New York by air mail where collection was promptly effected and the proceeds of the check were then credited to the account of The California National Bank in the Chase National Bank in the City of New York, and

(Testimony of Sandford S. Ruttenberg.)

that the Chase National Bank of the City of New York was the New York correspondent of The California National [46] Bank, with whom The California National Bank maintained an account.

3. That Plaintiff's Exhibit 8 is a true and correct transcript of the account of The California National Bank of Sacramento with the Chase National Bank during the entire period commencing with the day the \$35,000.00 check was credited to the account and to and including the date of the suspension of The California National Bank: that at the close of business on October 28, there was a credit on the books of the Chase National Bank of New York in favor of The California National Bank of Sacramento of the sum of \$82,653.65; that at the close of business on the day on which the \$35,000. check was collected, the credit balance in favor of The California National Bank of Sacramento was \$101,049.77; that the account of said The California National Bank of Sacramento with the said Chase National Bank of New York thereafter fluctuated and reached a low point on December 28, 1932, of \$8,732.84; and on the date of suspension, the balance in said account in favor of The California National Bank of Sacramento was \$50,691.28—that the defendant H. W. Douglass, as Receiver of The California National Bank, obtained and took into his possession cash or cash items equivalent to that amount—and that there was on hand in the vaults of The California National Bank continuously at all times during the period commencing

(Testimony of Sandford S. Ruttenberg.)

ing with the making of the Deposit of the \$35,000. check and up to and including the time Mr. Douglass as Receiver took charge of the assets of the bank an amount in cash in excess of the amount required to pay and discharge any balance of plaintiff's account and any other and all other claims entitled to that for which the plaintiff here contends, namely, priority in payment over general creditors. [47]

4. That plaintiff, Frank P. Wilson, duly filed a claim with the Receiver within the time provided by law and in the proper form, wherein he claimed priority as set forth in this complaint herein.

PLANTIFF RESTS.

DEFENDANT'S CASE

HENRY M. WESTON,

called by defendant testified as follows:

As I recall it, Mr. Ruttenberg stated that Mr. Wilson had sufficient funds on deposit in a New York Bank, which later developed to be the Manufacturers Trust Company—I don't remember of requesting Mr. Ruttenberg to have the funds transferred to The California National Bank. At the time the account was opened I remember that I introduced Mr. Ruttenberg to the gentlemen in the National Bank. One side of the building was devoted to the Trust and Savings Bank, and one side to the National Bank. I escorted Mr. Ruttenberg from the Trust and Savings Bank side to the Na-

(Testimony of Henry M. Weston.)

tional Bank side. I remember very distinctly Mr. Ruttenberg calling at the bank with the check at the time the account was opened and I thought that I took him over to Mr. Carter, the Cashier, but it is possible I took him to Mr. Sherwin who had charge of the new accounts in the bank.

Q. (By the Court) What is a special account?

A. Well, a special account is very often opened,—the same party might have one or more accounts in the bank, one account would be a special account which he would draw against for a specific purpose and designate it as a special account. The bank would have no control over the funds. It would be just his own way of designating that particular account.

The COURT: I understand from Mr. Weston's testimony that you could designate the account most any way you wished, could you not? The Witness: Yes. You might call it "Account No. One" and "Account No. Two", for your own convenience.

[48]

The COURT: Yes. And the only reason you used the designated "Special Account" was for that very reason. A. For the reason the depositor requested it.

The COURT: What were the words Mr. Ruttenberg used with reference to that, when he went to the bank? Can you find that, Mr. Reporter? Mr. Ruttenberg: Special deposit.

The COURT: Special deposit, yes. Mr. Ruttenberg said he wished a special deposit and the gentle-

(Testimony of Henry M. Weston.)

man behind the counter told him or suggested it be a special account and Mr. Ruttenberg said he didn't care what they called it so long as he carried out the terms of the agreement, so long as he understood how the deposit was to be received.

WITNESS resumes:

Mr. Ruttenberg called at the bank with the check to open the account. I am speaking of the account in the name of Frank P. Wilson. There were several letters and [49] correspondence regarding the continuation of the indebtedness with the bank with the understanding that this amount of money would be expended for improvements on this particular piece of property, and that if that sum was expended, the bank would grant a further additional advance of \$10,000. Yes, I understood that \$35,000. was to be used for improvements on the property. This \$35,000. was supposed to be used and expended for that purpose by Mr. Wilson.

DARWIN ARTHUR SHERWIN,
called by Defendant testified as follows:

I recall Mr. Ruttenberg calling at my desk at The California National Bank in October of 1932. I had charge of the cards there—the system they employed in making out new deposits—I and other officers. Mr. Ruttenberg opened a deposit in the name of Frank P. Wilson, Special Account. (Witness is here shown a signature card purporting to be the signature card of Frank P. Wilson and it is **STIPULATED** by plaintiff's counsel that same is

(Testimony of Darwin Arthur Sherwin.)

the genuine signature card of plaintiff and was signed by plaintiff and was sent to The California National Bank of Sacramento as signature to be honored when signed to checks on this account, and is asked by defendant's counsel what the words "Replace Card" on the reverse of the said card indicate, and witness made reply that): "That indicates that at the time the accounts were opened the party opening the account was not present to sign the card and we put in what is known as a placer card and that card was replaced when the original signature card was returned."

Signature card introduced, marked DEFENDANT'S EXHIBIT A, and is as follows:

"Form 37 5M 1-32

"Below please find duly authorized signatures which you will recognize in the payment of funds or the transaction of other business for the account of.

FRANK P. WILSON, SPECIAL ACCOUNT.
50 Broadway, New York, N. Y.

WITH THE CALIFORNIA NATIONAL
BANK OF SACRAMENTO, CAL.

And the undersigned hereby agrees as follows:

[50]

In receiving items for deposit or collection, this Bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. This Bank will not be liable for default or negligence of its duly selected correspondents nor for losses in transit,

(Testimony of Darwin Arthur Sherwin.)

and each correspondent so selected shall not be liable except for its own negligence. This Bank or its correspondents may send its items, directly or indirectly, to any Bank including the payor, and accept its draft or credit as conditional payment in lieu of cash; it may charge back any item at any time before final payment, whether returned or not, also any item drawn on this Bank not good at close of business on day deposited.

“All items are forwarded without instructions to protest if unpaid unless this Bank is otherwise instructed.

“Items need not be presented through the clearing house or forwarded to outside points until the business day following the day of deposit.

“The California National Bank is hereby authorized to forward monthly statement by ordinary mail to the address below, at the risk of the undersigned.

Signatures:

- 1.....(Signed)....FRANK P. WILSON.....
- 2
- 3
- 4

Address—50 Broadway New York City, N. Y.

Date—Nov. 17, 1932”

Reverse side of signature card:

CO-DEPOSITOR CLAUSE

“TO THE CALIFORNIA NATIONAL BANK
OF SACRAMENTO, CALIFORNIA:

“It is hereby declared by the Undersigned that

(Testimony of Darwin Arthur Sherwin.)

the funds now in this account or which may hereafter come into this account from any sources whatsoever are, and shall be, the property of the undersigned jointly and severally and are to be paid by THE CALIFORNIA NATIONAL BANK to us or to either of us in the absence of the other or to any other person or persons duly authorized by us or either of us to receive them or any portion of them and receipt therefor. In the event of the death of either of us, the funds shall be payable to the survivor, and in the event of the death of the survivor the funds shall be payable to the administrator, executor, heirs, assigns or legal successors of such survivor, and at all times, the funds in this account or any part thereof shall be paid by THE CALIFORNIA NATIONAL BANK to the person or persons so entitled to draw them regardless of the original ownership of the moneys so deposited. [51]

“In case of the death of either or both of us, further repayment shall at the option of THE CALIFORNIA NATIONAL BANK be conditioned upon the production of evidence that all inheritance and estate taxes—if any be due—have been paid, and that all other provisions of law in such cases made and provided have been fulfilled.

2

1

Date.....

Opened with cash - - \$.....

(1-30)

Opened with checks - \$ 35,000.—

Total - - - - \$.....

(Testimony of Darwin Arthur Sherwin.)

Reverse side of signature card continued:

“Owner of building leased
 Business—to W. T. Grant Co.
 Introduced by—H. M. Weston
 Opened by—D. A. S. (S. S. Ruttenberg)
 Reference

Account secured by.....

S. S. Ruttenberg is Supt. of Leases

Remarks—for W. T. Grant Co.

Placer

RELACES / CARD

DATED 10-27-32

Date closed.....

Date re-opened.....

WITNESS IS SHOWN a deposit slip purport-
 ing to cover the account of Frank P. Wilson and
 which is marked DEFENDANT'S EXHIBIT B,
 and is as follows:

“Depositors are requested to Specify Banks upon
 which checks are Drawn

. new

DEPOSITED BY

Frank P. Wilson

SPECIAL ACCOUNT

50 Broadway, New York

N. Y. [52]

(Testimony of Darwin Arthur Sherwin.)

WITH
THE CALIFORNIA NATIONAL BANK
of Sacramento

SACRAMENTO, CALIF., OCT. 27 1932

DOLLARS CENTS

Gold
Silver
Currency
Checks

1 - 30—

35 000 —

: 106 :

“In receiving items for deposit or collection, this Bank acts only as depositor’s collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. This Bank will not be liable for default or negligence of its duly selected correspondents nor for losses in transit, and each correspondent so selected shall not be liable except for its own negligence. This Bank or its correspondents may send its items, directly or indirectly to any bank including the payor, and accept its draft or credit as conditional payment in lieu of cash; it may charge back any item at any time before final payment whether returned or not, also any item drawn on this Bank not good at close of business on day deposited.

“All items are forwarded without instructions to

(Testimony of Darwin Arthur Sherwin.)

protest if unpaid unless this Bank is otherwise instructed.

“Items need not be presented through the Clearing House or forwarded to outside points until the business day following the day of deposit.”

and WITNESS said, “I made out that deposit slip—I gave the depositor a book and I made that notation and it went through the routine of the bank; it went to the ledgers—this tag that has been referred to, that is the bank record and I placed the amount in the deposit book and initialed the deposit book.

It is customary to send the depositor’s monthly statements—customary to send them to the address noted on the pass book. I had nothing to do with sending out statements.” [53]

STIPULATED THAT MONTHLY STATEMENTS of his account were sent to and received by Mr. Wilson, and that the checks drawn by Mr. Wilson and paid by the bank were sent back to him with the monthly statements with the exception of checks that had been presented since the bank suspended.

WITNESS SHERWIN

recalled by Defendant testified:

Mr. Weston brought Mr. Ruttenberg over to my desk with a check for \$35,000. I don’t recall the exact conversation, but Mr. Ruttenberg explained

(Testimony of Darwin Arthur Sherwin.)

to me that he wanted to open a commercial account under the name of Frank P. Wilson, and we proceeded with the mechanics of opening the account. Nothing was said regarding the bank having a joint control or getting an architect's certificate before the payment of checks. That money shown by this deposit card went into the general funds of the bank.

CROSS EXAMINATION

I did not participate in any of the negotiations leading up to the agreement and extension of Mr. Wilson's loan. I did not know anything about the terms and conditions imposed upon Mr. and Mrs. Wilson relative to the extension of their loan. I knew nothing of that. My principal business was in handling the new accounts—that is, I handled the mechanical part of the opening of a new account. I do not remember the exact conversation which I had on October 27 with Mr. Ruttenberg or Mr. Weston, but I have seen the signature card since and I recall that a general conversation was had at that time regarding the opening of a special account. I do not recall the exact conversation except that Mr. Ruttenberg asked to have it put in a special account. I do not remember whether he asked for a special *ccount* or special deposit. I do not recall telling him that we did not have a stamp "Special Deposit". I do not recall hearing Mr. Ruttenberg say "Well, just as long as it is understood what the purpose of the deposit is, it

(Testimony of Darwin Arthur Sherwin.)

is all right." I did not know the purpose [54] of the deposit at the time the account was opened. I was not familiar with that.

REDIRECT EXAMINATION

I made out this deposit on the instructions from Mr. Ruttenberg, and I followed his instructions as he told me.

HENRY M. WESTON

recalled by defendant, testified as follows:

"The transaction of the opening of the account with The California National Bank of Sacramento was carried on between Mr. Ruttenberg and Mr. Sherwin. I did not hear the conversation between them. We have never received any architect's receipts or certificates concerning this account and there are none such in the records of the bank.

The California Trust and Savings Bank is a State Bank with a State Charter, and The California National Bank of Sacramento is a National Bank holding a National Charter. The California Trust and Savings Bank is known as a departmental bank. It has a trust department and an escrow department situated in the trust department. It has a savings department and also a commercial department. They are in the same building and on the same floor of that building. The trust department was on the second floor of the building. The California Trust and Savings

(Testimony of Henry M. Weston.)

does a banking business on one floor—the first floor of that building and the savings bank was on that floor, too. The California National Bank was on that same floor. Practically the entire National Bank's business was transacted on the west side of the building and the Trust and Savings bank on the east side. As you go into the building on your left there is a sign there "The California National Bank" on the counter, and on your right side it is "California Trust and Savings Bank". There was no partition between the banks. It was one big floor with cages running right around the room. There were three additional [55] floors on which there were trust departments, and other departments of the national bank also. The physical fittings of the bank were the same throughout. The California National Bank of Sacramento was a Commercial Bank.

The Trust Department employed about seven people and in that Trust Department we have facilities for handling escrows.

CROSS EXAMINATION

I did not personally, and I do not know of any one else who did, demand architect's certificates as a condition to honoring the checks on the deposit made by Mr. Wilson. Mr. A. B. Carter was the Cashier of both institutions, that is to say, his title would be Secretary of the California Trust and Savings Bank. He sat on the left side—The California National Bank's side. The officers of one

(Testimony of Henry M. Weston.)

bank were also the officers of the other institution, and all officers, except myself and assistant cashier, sat on the National Bank's side.

Defendant's EXHIBIT C was introduced—same consisted of bank statements of account for Nov., 1932 and Dec., 1932, respectively, each of which was headed:

“Statement
in account with
The California National Bank
Sacramento, Calif.

Frank P. Wilson
Special Account
50 Broadway
New York, N. Y.

—the November, 1932, statement showed deposit 11/27/32 \$35,000 and payment of checks as follows: 11/28 \$4,500; 11/29 \$550; 11/30 \$1,403.60 and balance of deposit 11/30 \$28,546.40; the December, 1932, statement showed payment of checks as follows: 12/1, \$782.07; 12/7, tax .06; 12/8, \$843.30; 12/9, \$550; 12/12, \$820; 12/19, \$54.50 and balance 12/19 \$19,196.47—and it was STIPULATED that said statements had been sent by The California National Bank of Sacramento to plaintiff in due course of business. [56]

Defendants Exhibit D was introduced—and it was stipulated that same is a copy of the ledger

(Testimony of Henry M. Weston.)

sheet of the bank showing the state of this account:
Said sheet is headed

“Name—Frank P. Wilson Special Account
Address—50 Broadway, New York, New York”

and shows deposit 10/27/32 \$35,000. and payment of all checks enumerated in Exhibit C and in addition thereto the following; viz: 1/3/33. \$187; 1/5/33 Tax .12; 1/7/33, \$3,084.30; 1/7/33, \$550.; 1/10/33, \$1,102.50; 1/12/33 \$842.85; 1/20/33 tax .10, and balance 1/20/33 \$13,429.60.

**EVIDENCE CLOSED. TO BE SUBMITTED
ON BRIEFS**

Submission:

Thereafter brief filed and cause submitted.

The above and foregoing statement of evidence is a true and correct statement of evidence heard at the trial of above entitled cause, and may be presented to, and approved by, the Judge without notice.

Dated: March 7, 1935.

H. B. SEYMOUR

DOWNEY, BRAND & SEYMOUR

Attorneys for Plaintiff.

The foregoing Statement of Evidence is in all respects approved and same is settled as a true and complete statement of the evidence adduced on the trial of the above entitled cause, and same is hereby ordered to be filed herein as a Statement of Evi-

dence to be included in the record on appeal of above entitled cause, in conformity with equity rule 75 of the Supreme Court of the United States.

[57]

And I further certify that those portions of said Statement of Evidence which purport to reproduce some of the testimony in the form of Question and Answer were so made at the request of plaintiff and by my direction.

Done in open court this 8th day of March, 1935.

A. F. ST. SURE

Judge of said Court—being the judge presiding at said trial.

[Endorsed]: Filed Mar 9 1935. [58]

[Title of Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL

To the Honorable A. F. St. Sure, Judge of the District Court of the United States, for the Northern District of California, Northern Division:

The above-named defendant, feeling himself aggrieved by the decree made and entered in this cause on the 10th day of December, 1934 hereby appeals from said decree to the Circuit Court of Appeals of the United States, for the Ninth Circuit, for the reasons specified in the assignments of error filed herewith, and prays that his appeal be

allowed and that a citation be issued as provided by law and that a transcript of the record, proceedings and papers on which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, and your petitioner prays that a proper order touching the security required to effect his appeal be made.

HINSDALE, OTIS & JOHNSON

GERALD R. JOHNSON

Attorneys for the Defendant and Appellant

Copy received this 28th day of February, 1935.

DOWNEY, BRAND & SEYMOUR

Attorneys for Plaintiff.

[Endorsed]: Filed Feb 28 1935. [59]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

Defendant, appellant, files and presents with his petition for allowance of appeal herein, the following as his assignment of errors on which he will rely in the prosecution of his appeal from the decree of the above entitled court made in the above entitled cause on December 10, 1934, viz:

I.

The court erred in overruling defendant's motion for a nonsuit—which said motion was made at the close of Plaintiff's case in chief and was made on

the grounds "that there never was any express agreement or implied agreement that the funds deposited would be kept separate and distinct from the general funds of The California National Bank of Sacramento, nor is the evidence sufficient to sustain a judgment, if the court should so find".

II.

The court erred in refusing defendant's request, made at the close of all the evidence and before any decision was announced or made, that the court find from the evidence that:

The deposit of funds mentioned in paragraph IX of the complaint herein and which is in controversy in this suit was made by plaintiff, Frank P. Wilson (by his agent S. S. Ruttenberg) and said deposit was not made by said plaintiff, and was not accepted by The California National Bank of Sacramento, under or in pursuance of any of the terms of any letter; and was not made or accepted on any terms or conditions save and except on the [60] terms and conditions of an ordinary and general deposit in a commercial bank.

III.

The court erred in refusing defendant's request, made at the close of all the evidence and before any decision was announced or made, that the court find from the evidence that:

There never was any agreement or understanding between plaintiff and The California National Bank of Sacramento that the deposit of funds referred

to in the complaint and involved in this cause, was to be held or kept separate from the general funds of said bank.

IV.

The court erred in refusing defendant's request, made at the close of all the evidence and before any decision was announced or made, that the court find from the evidence that:

At the time of the suspension of The California National Bank of Sacramento the funds comprising the deposit involved in this suit had, with the knowledge and consent of the depositor (*viz*, the complainant), been mingled with, and had become a part of, the general assets of said bank and subject to the check of said depositor as in the case of ordinary deposits in commercial banks.

V.

The court erred in refusing to hold (as requested by defendant at the close of the evidence and before any findings or decision were made or announced) that:

On the whole case the law and the facts are with defendant and plaintiff is not entitled to the relief sought or to any relief, and the Bill of Complaint should be dismissed with costs.

VI.

The court erred in making that portion of Finding of [61] Fact No. VII which reads as follows:

“That the said sum of \$35,000. was received and accepted by the California Trust and Savings Bank

upon the understanding, and said bank thereupon agreed with plaintiff that said amount was remitted by plaintiff as security only; that said remittance was not to be employed by said bank for its own purposes; and that the only and specific use to be made of said amount, and to the exclusion of all other uses, was the fulfillment of said guarantee by the application of said fund to the costs of said improvements and not otherwise.”

VII.

The court erred in making that portion of Finding of Fact No. VIII which reads as follows:

“The California National Bank of Sacramento was fully cognizant of all the terms, conditions, covenants, and agreements of the parties in respect to said fund and its purposes and of all limitations in respect to its use and accepted said deposit upon said terms and each of them, and promised and agreed with plaintiff that said amount was transmitted by plaintiff and was received and accepted by said The California National Bank of Sacramento for the purpose of security only; that said fund was not to be employed by said The California National Bank of Sacramento for its own purposes; and that the only and specific use to be made of said fund and to the exclusion of all other uses, was the fulfillment of said guarantee by the application of said fund to the cost of said improvements and not otherwise. That by said agreement the parties intended to and did make and constitute The California National Bank of Sacramento

trustee of said fund and a trust in the amount of said deposit was created by the parties by the terms and provisions of said understanding, and under said trust the use of said fund was restricted to the specific uses stated herein." [62]

VIII.

The court erred in making that portion of Finding of Fact No. XI, which reads as follows:

"That included in the assets which came into defendant's hands, as such Receiver, was said sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100th Dollars (\$13,429.60) and said assets so coming into said defendant's hands were received by him subject to a trust therein in plaintiff's favor for the full unexpended balance of said sum of Thirty-five Thousand Dollars (\$35,000.00), to-wit, Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars (\$13,429.60) and said sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars (\$13,429.60) has in all respects been traced into the hands of defendant as such Receiver."

IX.

The court erred in refusing to make Findings of Fact No. 1 requested by defendant—which said requested finding was as follows:

That the deposit of fund mentioned in paragraph IX of the complaint herein and which is in controversy in this suit was made by plaintiff, Frank P. Wilson (by his agent S. S. Ruttenberg) with The

California National Bank of Sacramento and said deposit was not made by said plaintiff, and was not accepted by The California National Bank of Sacramento, under or in pursuance of any of the terms of any letter; and was not made or accepted on any terms or conditions save and except on the terms and conditions of an ordinary and general deposit in a commercial bank.

X.

The Court erred in refusing to make Finding of Fact No. 2 requested by defendant which said requested finding was as follows:

That there never was any agreement or understanding [63] between plaintiff and The California National Bank of Sacramento that the deposit of funds referred to in the complaint and involved in this cause, was to be held or kept separate from the general funds of said bank or was not to be used by said bank in the general and usual conduct of its business as a commercial bank.

XI.

The court erred in refusing to make Finding of Fact No. 3 requested by said defendant which said requested finding reads as follows:

That at the time of the suspension of The California National Bank of Sacramento the funds comprising the deposit involved in this suit had, with the knowledge and consent of the depositor (viz, the complainant), been mingled with, and had become

a part of, the general assets of said bank and subject to the check of said depositor as in the case of ordinary deposits in commercial banks.

XII.

The court erred in refusing to make Finding of Fact No. 4 requested by said defendant which said requested finding reads as follows:

That the said The California National Bank of Sacramento was a national bank and the California Trust and Savings Bank was a state bank and said two banks were entirely separate and distinct corporate entities, and as to the deposit in question in this suit said banks had no privity of contract or of interest with each other.

XIII.

The court erred in refusing to make Finding of Fact No. 5 requested by said defendant, which said requested finding reads as follows:

That said The California National Bank of Sacramento had no notice or knowledge of any agreement or understanding between plaintiff and the said California Trust and Savings Bank [64] that the deposit involved in this suit was a special deposit or was impressed with any trust whatsoever.

XIV.

The court erred in refusing to hold that on the whole case the law and the facts are with defendant and plaintiff is not entitled to the relief sought

or to any relief, and the Bill of Complaint should be dismissed with costs.

XV.

The court erred in holding in its decree that there be and is hereby impressed in plaintiff's favor upon the assets of The California National Bank of Sacramento, a corporation, coming into the hands of defendant H. W. Douglass as Receiver of said Bank, a trust, preference and priority in the sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars (\$13,429.60).

XVI.

The court erred in holding in its decree that defendant holds the sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars (\$13,429.60) as trustee for plaintiff and that plaintiff is entitled to the payment of said sum forthwith.

XVII.

The court erred in holding in its decree that plaintiff do have and recover from defendant as Receiver of said The California National Bank of Sacramento, a corporation, the sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars (\$13,429.60), together with his costs of court herein taxed in the sum of \$59.47.

And for which errors said defendant prays that the judgment and decree of said court made and entered herein on [65] December 10, 1924, may be

reversed and for such other and further relief as to the court may seem just and proper.

Dated February 28th, 1935.

HINSDALE, OTIS & JOHNSON
GERALD R. JOHNSON

Attorneys for Defendant

Copy received this 28th day of February, 1935.

DOWNEY, BRAND & SEYMOUR
Attorneys for Plaintiff.

[Endorsed]: Filed Feb 28 1935 [66]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

This matter coming on for consideration upon the petition of the defendant and appellant for an order permitting his appeal from the findings and decree entered by this court on the 10th day of December, 1934, finding in favor of the plaintiff and appellee and against the defendant and appellant, all as set forth in the petition for appeal and the assignments of error which have been filed herein and were presented to this court along with said petition for appeal;

Now, therefore, premises considered, it is Ordered that said appeal be allowed as prayed for in said petition; and, it appearing to the court by the testimony of defendant that he has been authorized and

directed by The Comptroller of The Currency to appeal from said Decree to the United States Circuit Court of Appeals for the Ninth Circuit, it is, in view of the provisions of Title 28 U. S. C. A. Section 870, FURTHER ORDERED that no bond be required to be given by appellant.

Done in open Court March 6, 1935.

A. F. ST. SURE

U. S. District Judge.

Copy received and service admitted this 7th day of March, 1935.

H. B. SEYMOUR

DOWNEY, BRAND & SEYMOUR

Attorneys for Defendant

[Endorsed]: Filed Mar 7 1935 [67]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the above entitled Court,

GREETING:

You will please prepare a transcript of the record in the above entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, upon the appeal heretofore perfected in said Court in the above entitled cause,

and include therein the following papers and records, to-wit:

Complaint

Answer

Statement of Evidence

Defendant's request for findings and holding by the Court—filed April 16, 1934.

Defendant's requested Findings—filed November 22, 1934.

Findings made by the Court

Order of Court announcing its decision—filed November 16, 1934.

Order of Court allowing exceptions to defendant Decree

Petition for allowance of Appeal

Assignment of Errors

Order allowing Appeal

Citation (original)

Praecipe

Dated March 9, 1935.

HINSDALE, OTIS & JOHNSON

GERALD R. JOHNSON

Attorneys for Defendant

Copy received and service admitted this 9th day of March, 1935.

HARRY B. SEYMOUR

DOWNEY, BRAND & SEYMOUR

Attorneys for Plaintiff

[Endorsed]: Filed Mar 9 1935 [68]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 68 pages, numbered from 1 to 68 inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of Frank P. Wilson, vs. H. W. Douglass, etc., No. 1163-S (Equity), as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of Twenty-three and 60/100 (\$23.60) and that the same has been paid to me by the attorneys for the appellant herein.

Annexed hereto is the original citation on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 19th day of March, A.D. 1935.

[Seal]

WALTER B. MALING

Clerk,

By F. M. LAMPERT

Deputy Clerk. [69]

[Title of Court and Cause.]

CITATION

The United States of America to Frank P. Wilson,
GREETING:

You are hereby notified that in a certain cause in Equity in the United States District Court for the Northern District of California, Northern Division; wherein you appear as plain- [70] tiff and H. W. Douglass, as Receiver of The California National Bank of Sacramento appears as defendant, an appeal has been allowed the defendant to the United States Circuit Court of Appeals, for the Ninth Circuit. You are hereby cited and admonished to be and appear in said Court at San Francisco, California, thirty days after the date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable A. F. ST. SURE,
United States District Judge for the Northern District of California, this 6th day of March, 1935.

A. F. ST. SURE

U. S. District Judge.

Service of the within citation admitted this 7th day of March, 1935.

H. B. SEYMOUR

DOWNEY, BRAND & SEYMOUR

Attorneys for the Plaintiff.

[Endorsed]: Filed Mar 7 1935 [71]

[Endorsed]: No. 7805. United States Circuit Court of Appeals for the Ninth Circuit. H. W. Douglass, as Receiver of the California National Bank of Sacramento, Appellant, vs. Frank P. Wilson, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed March 20, 1935.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit. *no.*

(5-2)